

In September, 1932, the rent in arrears amounted to \$1,650. Demand was made for payment, and the bankrupt admitted it was unable to pay, and would continue to be unable to pay. Appellee advised the bankrupt that he would forfeit the lease and foreclose the chattel mortgage. The parties then entered into an agreement, as a result of which the deposit of \$2,000 and certain property covered by the chattel mortgage, but not all of it, having a fair market value of \$2,000 and rental value of \$20 per month, was transferred to appellee, in settlement of past-due rent and damages for the breach. The lease was surrendered, and appellee went into possession of the building. The deposit was applied to the payment of the overdue rent under the terms of the lease. Appellee accepted the property transferred, in full settlement of any damages accruing from the breach of the lease, and took possession of the premises. The bankrupt at that time was insolvent, to the knowledge of both parties, and was adjudicated bankrupt on October 31, 1932. After taking possession of the premises, appellee was unable to make a new lease for the unexpired term of the bankrupt's lease, but rented the building, and the personal property turned over, to Bert Haston, having no connection with the bankrupt, from month to month, at \$235 per month, until June 24, 1933. Haston was then unable to continue payment of that amount, and the rent was reduced to \$200 per month in order to keep a tenant. Appellee continued to collect the rent of the filling station at \$150 per month. He could not have rented the property to any one else for more than \$330 per month, including the filling station, at the time the lease was breached. It is unnecessary to refer to the other findings of fact.

The District Court found that the parties were in absolute good faith, and there was no intention to hinder, delay, or defraud other creditors; that the chattel mortgage and lease, in all its provisions, were valid when entered into; that the subsequent transaction by which the property was transferred amounted to no more than the enforcement of a valid lien created more than four months before and not affected by the bankruptcy; that appellee had suffered damages exceeding \$6,000.

We agree with the conclusions of the District Court. *Coder v. Arts*, 213 U. S. 223, 29 S. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008; *Thompson v. Fairbanks*, 196 U. S. 516, 25 S. Ct. 306, 49 L. Ed. 577; *Irving*

Trust Co. v. Perry, Inc., 55 S. Ct. 150, 79 L. Ed. —, decided December 3, 1934.

Affirmed.



UNITED STATES ex rel. CHERAMIE v. DUTTON, United States Marshal.*
No. 7346.

Circuit Court of Appeals, Fifth Circuit.
Jan. 10, 1935.

Rehearing Denied Feb. 9, 1935.

Constitutional law ¶24

One convicted for possessing and transporting intoxicating liquor must serve his sentence notwithstanding repeal of Eighteenth Amendment, where sentence became final before repeal and execution thereof was postponed, not suspended, until after repeal (27 USCA § 1 et seq.; Const. Amend. 18).

Appeal from the District Court of the United States for the Eastern District of Louisiana; Wayne G. Borah, Judge.

Petition for a writ of habeas corpus by the United States of America, on the relation of Bertoul Cheramie, against Tom W. Dutton, United States Marshal for the Eastern District of Louisiana (Sidney A. Freudenstein, United States Marshal, substituted in place of Tom W. Dutton, his predecessor). From an order discharging the writ and remanding petitioner to the custody of the marshal for commitment to the penitentiary, petitioner appeals.

Affirmed.

Jno. W. Harrell, of New Orleans, La., for appellant.

Rene A. Viosca, U. S. Atty., Saul Stone, Asst. U. S. Atty., and William H. Norman, Sp. Asst. U. S. Atty., all of New Orleans, La., for appellee.

Before BRYAN, FOSTER, and WALKER, Circuit Judges.

BRYAN, Circuit Judge.

This is an appeal from an order discharging a writ of habeas corpus and remanding the petitioner to the custody of the marshal for the Eastern District of Louisiana, for commitment to the Atlanta Penitentiary.

*Rehearing denied Feb. 9, 1935.

Appellant was convicted as charged in two cases. In the first an indictment in two counts charged him with entering into a conspiracy; in one to import and transport intoxicating liquor, and in the other to import intoxicating liquor. Both offenses were laid in 1928, and the same overt acts were alleged in each count. Appellant was sentenced on the first count to serve 12 months and to pay a fine of \$1,000, and on the second to serve 2 years in the penitentiary, but the second sentence was suspended and he was placed on probation for a period of 5 years. In the second case appellant was indicted and convicted in 1932 for possessing and transporting intoxicating liquor in violation of the National Prohibition Act (27 USCA § 1 et seq.) and sentenced to serve 15 months in the penitentiary. At the same time his suspended sentence was revoked, but made to run concurrently with the one last imposed. Appeals were taken, but they were dismissed for want of prosecution, and the sentences became final on November 2, 1933, or before the effective date of the repeal of the Eighteenth Amendment. Appellant, however, did not promptly surrender himself for the purpose of undergoing the punishment imposed, but on the contrary was allowed to remain at large until February 20, 1934, when he appeared before the District Judge and applied for further postponement of the execution of the sentences; and was by order of the District Judge permitted to remain at liberty for 30 days more. In March appellant surrendered to the marshal, but immediately applied for a writ of habeas corpus by which he sought to procure his unconditional release from custody on the grounds (1) that he had served the only valid sentence imposed in the first case, and (2) that as to both cases, the Eighteenth Amendment having been repealed, under the decision of the Supreme Court in *United States v. Chambers*, 291 U. S. 217, 54 S. Ct. 434, 78 L. Ed. 763, 89 A. L. R. 1510, the court was powerless to order him committed to the penitentiary.

In support of his first contention, appellant relies on our decision in *Bertsch v. Snook*, 36 F.(2d) 155; but it is immaterial at this time to inquire whether this position is tenable, for in any event appellant, not having served any part of the sentence imposed in the second case, is not entitled to be set free. We think that at least the second sentence remains valid and enforceable notwithstanding the repeal of the Eighteenth

Amendment. And we think so because the judgment was valid when rendered, and remained valid without the necessity of being constantly renewed, as was held by this court in *Hosier v. Aderhold*, 71 F.(2d) 422. There was no suspension of the sentence in the second case, but there was merely a postponement, a withholding at appellant's request, of the order of commitment.

The judgment is affirmed.



**GROSJEAN, Supervisor of Public Accounts
of Louisiana et al. v. MUSSER.**
No. 7490.

Circuit Court of Appeals, Fifth Circuit.
Jan. 10, 1935.

Rehearing Denied Feb. 1, 1935.

Courts ⇄ 328(3)

Where nonresident's bill to enjoin collection of state cigarette tax did not show that amount of tax which might be demanded during pendency of suit was as much as is required to give court jurisdiction, District Court was without jurisdiction of controversy, since disputed tax was the matter in controversy and not penalty or loss which the payment of the tax would avoid.

Appeal from the District Court of the United States for the Western District of Louisiana; Benjamin C. Dawkins, Judge.

Suit by Glenn W. Musser, doing business as the Texas Tobacco Company, against Alice Lee Grosjean, Supervisor of Public Accounts of the State of Louisiana, and others. From a decree for plaintiff (7 F. Supp. 1010), defendants appeal.

Reversed.

Edwin L. Richardson, Justin C. Daspit, F. A. Blanche, and Peyton R. Sandoz, all of Baton Rouge, La., and Robt. J. O'Neal, of Shreveport, La., for appellants.

Aubrey M. Pyburn, of Shreveport, La., for appellee.

Before BRYAN, FOSTER, and WALKER, Circuit Judges.